

No. 14454.

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

ARTURO FLETES-MORA,

Appellant,

vs.

HERBERT BROWNELL, Attorney General of the United
States,

Appellee.

BRIEF FOR APPELLEE.

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TOPICAL INDEX

	PAGE
Jurisdiction of the court.....	1
Statement of the case.....	2
Statutes involved	3
Argument	4
I.	
Summary	4
II.	
Appellant's petition did not contain sufficient allegations to confer jurisdiction upon the District Court under the provisions of Section 360(a) of the Immigration and Nationality Act of 1952.....	6
III.	
Independent of the provisions of Section 360(a) of the Immigration and Nationality Act of 1952, the District Court did not acquire jurisdiction over either the subject matter or the person of appellee.....	11
IV.	
Constitutional issues advanced by appellant.....	12
A. The record furnishes no basis for this court to consider the constitutional issues advanced by appellant.....	12
B. The constitutional issues advanced by appellant are without merit	14
V.	
Conclusion	15

TABLE OF AUTHORITIES CITED

CASES	PAGE
Alexander v. Westgate-Greenland Oil Co., 111 F. 2d 769.....	6
Avila-Contreras v. McGranery, 112 Fed. Supp. 264.....	12
Avina v. Brownell, 112 Fed. Supp. 15.....	10, 14
Bustos-Ovalle v. Landon, 112 Fed. Supp. 874.....	12
Carmichael v. Delaney, 170 F. 2d 239.....	15
Clark v. Inouye, 175 F. 2d 740.....	7, 8
Connor v. Miller, 178 F. 2d 755.....	12
Dulles v. Lee Gnan Lung, 212 F. 2d 73.....	7
Elizarraraz v. Brownell, 217 F. 2d 829.....	6, 9
Engel v. Tribune Co., 189 F. 2d 177.....	6
Federation of Labor v. McAdory, 325 U. S. 450.....	13
Florentine v. Landon, 206 F. 2d 870.....	10
Fong Wone Jing v. Dulles, 217 F. 2d 138.....	7
Gonzalez Gomez v. Brownell, 114 Fed. Supp. 660.....	14
Grace v. American Central Ins. Co., 109 U. S. 278.....	6
Hague v. C. I. O., 307 U. S. 496.....	11
Hanford v. Davis, 163 U. S. 273.....	6
Joy v. Hague, 175 F. 2d 395; cert. den., 338 U. S. 870.....	6, 11
Kline v. Burke Construction Co., 260 U. S. 226.....	14
Linzalone v. Dulles, 120 Fed. Supp. 107.....	10
McNutt v. General Motors Acceptance Corp., 298 U. S. 178.....	6
Meyers v. Bethlehem Shipbuilding Corp., 303 U. S. 41.....	10
Ng Fung Ho v. White, 259 U. S. 276.....	15
People v. Bruce, 129 F. 2d 421; cert. den., 317 U. S. 710.....	14
Rodriguez v. Landon, 212 F. 2d 508.....	12
Royal Service Corp. v. City of Los Angeles, 98 F. 2d 551.....	6
Samaniego v. Brownell, 212 F. 2d 891.....	10
Skelly Oil Co. v. Phillips Co., 339 U. S. 667.....	11
Smith, Ex parte, 94 U. S. 455.....	6

	PAGE
Smith v. McNeal, 109 U. S. 426.....	13
Southern Pacific Co. v. McAdoo, 82 F. 2d 121.....	11
United Public Workers v. Mitchell, 330 U. S. 75.....	13
United States v. Rumley, 345 U. S. 41.....	13
United States v. Spector, 343 U. S. 169.....	13
Zank v. Landon, 205 F. 2d 615.....	2

RULES

Federal Rules of Civil Procedure, Rule 4(d)(5).....	12
Federal Rules of Civil Procedure, Rule 8(a)(1).....	6
Federal Rules of Civil Procedure, Rule 12(b)(1), (2), (6).....	2

STATUTES

Immigration and Nationality Act of 1952, Sec. 360(a) (66 Stat. 273)	1, 2, 3, 4, 5, 7, 10, 12, 13, 14
Nationality Act of 1940, Sec. 503 (54 Stat. 1171).....	8, 9
United States Code Annotated, Title 8, Sec. 903.....	8
United States Code Annotated, Title 8, Sec. 1503(a)....	1, 2, 3, 7
United States Code Annotated, Title 28, Sec. 1291.....	2
United States Code Annotated, Title 28, Sec. 1331.....	3, 4, 11
United States Code Annotated, Title 28, Sec. 2201.....	1, 3, 11
United States Constitution, Art. III.....	12, 13, 14
United States Constitution, Fifth Amendment	12

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IN THE
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ARTURO FLETES-MORA,

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HERBERT BROWNELL, Attorney General of the United
States,

Appellee.

BRIEF FOR APPELLEE.

Jurisdiction of the Court.

Appellant claimed jurisdiction in the Court below [R. 3] under the provisions of Section 2201, Title 28 U. S. C. A. and under Section 360(a) of Public Law Number 414 (Immigration and Nationality Act of 1952, 66 Stat. 273, 8 U. S. C. A., §1503(a)). The District Court dismissed appellant's Petition for lack of jurisdiction over the subject matter and lack of jurisdiction over the person [R. 12]. It is the position of appellee that the District Court was without jurisdiction over the subject matter under the provisions of Section 360(a) of the Immigration and Nationality Act of 1952, and that insofar as appellant sought relief independent of the latter statute, the Court lacked jurisdiction over both the subject matter and the person of appellee.

Since the judgment of the Court below was a final decision, this Court has jurisdiction of an appeal from that

decision pursuant to 28 U. S. C. A., Section 1291. However, the jurisdiction of this Court ends if it finds that the District Court was without jurisdiction of the subject matter.

Zank v. Landon, 205 F. 2d 615 (C. A. 9, 1953).

Statement of the Case.

On November 30, 1953 appellant filed in the Court below a Petition for Declaration of United States Nationality and for Declaratory Relief, seeking to be declared a citizen and national of the United States [R. 3-5]. He alleged birth at Los Angeles, California, on September 23, 1925 [R. 3]. On February 19, 1954 appellee, appearing specially and without waiving any of his objections to the jurisdiction of the Court, moved the Court for dismissal pursuant to Rule 12(b)(1), (2), and (6), Federal Rules of Civil Procedure [R. 5-6]. On March 11, 1954, the District Court ordered that appellee's motion to dismiss for lack of jurisdiction over both the subject matter and the person be granted, and that such dismissal should not operate as an adjudication upon the merits [R. 7-10]; and on March 30, 1954, judgment was entered accordingly [R. 11-12].

The present appeal was taken from that judgment and presents the following questions:

1. Did appellant's Petition contain sufficient allegations to confer jurisdiction upon the District Court under the provisions of Section 360(a) of the Immigration and Nationality Act of 1952, 66 Stat. 273, U. S. C. A. 1503(a)?

2. Independent of Section 360(a) of the Immigration and Nationality Act of 1952, did the District Court acquire

jurisdiction over the subject matter or the person of appellee?

3. Does the record furnish a basis for this Court to consider the constitutional issues advanced by appellant?

4. Assuming that this Court deems it proper to consider the constitutional issues advanced by appellant, is there any merit to appellant's contentions?

Statutes Involved.

Section 360(a) of the Immigration and Nationality Act of 1952, 66 Stat. 273, 8 U. S. C. A., Section 1503(a) is quoted in Part II of Argument.

Title 28 U. S. C. A., Section 2201, 62 Stat. 964, commonly referred to as the Federal Declaratory Judgment Act, provides:

“§2201. Creation of remedy.

“In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.”

Title 28, U. S. C. A., Section 1331, 62 Stat. 930, provides:

“§1331. Federal question; amount in controversy.

“The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.”

ARGUMENT.

I.

Summary.

Appellant's Petition was insufficient to invoke the jurisdiction of the District Court under the provisions of Section 360(a) of the Immigration and Nationality Act of 1952, since it contains no averment that appellant was denied any specific right or privilege as a national of the United States upon the grounds that he was not such a national, as required by this statute. Nor does appellant's Petition allege or show that it was filed within five years after the final administrative denial of a claimed right or privilege, as required.

Insofar as appellant claimed relief independent of the provisions of Section 360(a) of the Immigration and Nationality Act of 1952, the District Court lacked jurisdiction over both the subject matter and the person of appellee. The Act authorizing declaratory judgments merely enlarges the range of remedies available in federal courts, and affords no independent basis for federal jurisdiction. Neither may appellant avail himself of Section 1331, Title 28, U. S. C. A., which authorizes jurisdiction of actions arising under the Constitution of the United States, because his Petition does not allege the requisite jurisdictional amount. Even if it be assumed, however, that these statutes permit an action for declaration of nationality independent of Section 360(a), the Court below did not acquire jurisdiction over the person of

appellee for such an action. The Attorney General may be served with process only in the District of Columbia and appellee did not waive this requirement.

Appellant urges that Article III of the Constitution must be read into Section 360(a) of the Immigration and Nationality Act of 1952 and that appellant is being deprived of citizenship without due process. These arguments, constitutional in nature, are not properly before this Court, since the record does not disclose, nor does appellant contend in his brief, that he is unable to allege sufficient facts to bring himself within the purview of Section 360(a). Assuming, however, that this Court deems it proper to pass upon appellant's contentions, the latter are without merit. Only the Supreme Court derives jurisdiction directly from the Constitution; and even if appellant is unable to invoke the provisions of Section 360(a), he will not thereby be deprived of a constitutional right. He will only be relegated to the judicial remedies, such as habeas corpus, which existed prior to the statute.

II.

Appellant's Petition Did Not Contain Sufficient Allegations to Confer Jurisdiction Upon the District Court Under the Provisions of Section 360(a) of the Immigration and Nationality Act of 1952.

There are no presumptions in favor of the jurisdiction of Courts of the United States. (*Grace v. American Central Ins. Co.*, 109 U. S. 278 (1883); *Ex parte Smith*, 94 U. S. 455 (1876)). One seeking the exercise of federal jurisdiction in his favor must allege in his pleading facts essential to show jurisdiction, and if he fails to make the necessary allegations, he has no standing in Court.

Rule 8(a)(1), Federal Rules of Civil Procedure,
28 U. S. C. A.;

McNutt v. General Motors Acceptance Corp., 298
U. S. 178, 189 (1936);

Hanford v. Davis, 163 U. S. 273 (1896);

Engel v. Tribune Co., 189 F. 2d 177 (C. A. 7,
1951);

Joy v. Hague, 175 F. 2d 395 (C. A. 1, 1949),
cert. den., 338 U. S. 870;

Alexander v. Westgate-Greenland Oil Co., 111 F.
2d 769, 770 (C. C. A. 9, 1940);

Royal Service Corp. v. City of Los Angeles, 98 F.
2d 551, 554 (C. C. A. 9, 1938).

The foregoing principle, well established in all cases where federal jurisdiction is claimed, applies to actions for declaratory of nationality.

Elizarraras v. Brownell, 217 F. 2d 829 (C. A.
9, 1954);

Fong Wone Jing v. Dulles, 217 F. 2d 138 (C. A. 9, 1954);

Dulles v. Lee Gnan Lung, 212 F. 2d 73 (C. A. 9, 1954);

Clark v. Inouye, 175 F. 2d 740 (C. A. 9, 1949).

Appellant sought to invoke the jurisdiction of the Court below pursuant to the provisions of Section 360(a) of the Immigration and Nationality Act of 1952, 66 Stat. 273, 8 U. S. C. A., Section 1503(a). This statute provides:

“(a) If any person who is within the United States *claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States*, such person may institute an action under the provisions of section 2201 of Title 28, against the head of such department or independent agency for a judgment declaring him to be a national of the United States, except that no such action may be instituted in any case if the issue of such person’s status as a national of the United States (1) arose by reason of, or in connection with any exclusion proceeding under the provisions of this chapter or any other act, or (2) is in issue in any such exclusion proceeding. *An action under this subsection may be instituted only within five years after the final administrative denial of such right or privilege* and shall be filed in the district court of the United States for the district in which such person resides or claims a residence, and jurisdiction over such officials in such cases is conferred upon those courts.” (Emphasis added).

Appellant’s Petition omitted jurisdictional allegations necessary to bring him within the purview of the above

quoted statute. Appellant's Petition contains no averment that he was denied any specific right or privilege as a national of the United States upon the grounds that he was not such a national; nor does the Petition allege or show that it was filed within five years after the final administrative denial of a claimed right or privilege.

Paragraph III of the Petition alleges in general terms [R. 4]:

"Petitioner herein claims the rights and privileges as a citizen and national of the United States and has been denied such rights and privileges by the respondent herein on the ground that said respondent contends that he is not a citizen of the United States, but an alien and citizen and national of the Republic of Mexico, and is not entitled to the rights and privileges as a citizen of the United States."

The remainder of the Petition is no more illuminating. In Paragraph IV appellant alleges that

". . . it was determined that he is a citizen and national of the Republic of Mexico, and not entitled to be and remain in the United States, *or* to enter the United States as a citizen thereof . . ." (Emphasis added).

However, there are no allegations showing when this determination was made, whether it was communicated to appellant, or what specific right or privilege was denied to him as a result of such determination.

This Court was confronted with a similar pleading in *Clark v. Inouye*, 175 F. 2d 740 (C. A. 9, 1954). There, an action was instituted for declaration of citizenship under Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 8 U. S. C. A., Section 903, predecessor

to the statute here involved. The amended complaint alleged in part that “the defendants deny that plaintiffs are nationals of the United States and have denied the plaintiffs’ rights and privileges as nationals of the United States; and have announced that the plaintiffs do not possess United States nationality or citizenship.” This Court held that the allegation was but a conclusion of law and that since it was unsupported by any allegations of fact, the District Court was without jurisdiction, even though the allegation was admitted by the defendants in their answer.

Again, in the recent case of *Elizarraras v. Brownell*, 217 F. 2d 829 (C. A. 9, 1954), this Court of its own initiative took note of a pleading similarly defective. Here, too, an action for declaration of nationality was instituted under Section 503 of the Nationality Act of 1940; and the Petition alleged that the Attorney General of the United States “has denied the plaintiff his rights and privileges as a national of the United States in that he has decided and determined that the plaintiff is not a national of the United States.” In commenting upon the insufficiency of this allegation, Judge Goodman observed (pp. 830-831) :

“[1] The complaint contained *no allegation that appellant was denied any specific right or privilege* as a national by any department or agency of the United States upon the ground that he was not a national of the United States. Indeed, the transcript of the record before us contains neither evidence nor stipulation showing that any officer, agency or department of the United States denied appellant any specified right or privilege as a national on the ground that he was not a national of the United States. Thus we could well affirm the judgment below upon the

ground that there was neither allegation nor proof that appellant was denied any right or privilege as a national upon the ground that he was not a national. See *Fong Wone Jing v. Dulles, Secretary of State*, 9 Cir., 217 F. 2d 138.” (Emphasis added).

The Petition in the case at bar, however, lacks still another jurisdictional averment. Section 360(a) of the Immigration and Nationality Act of 1952 expressly provides that an action thereunder “may be instituted only within five years after the final administrative denial” of a right or privilege. Appellant alleges no facts to show that his Petition was filed within five years after the final administrative denial of a claimed right or privilege, or even to show that a final administrative denial occurred. District courts having occasion to construe Section 360(a) concur that a final administrative denial is required before an action may be maintained under this section. (See: *Linzalone v. Dulles*, 120 Fed. Supp. 107, 109 (D. C., S. D., N. Y., 1954); *Avina v. Brownell*, 112 Fed. Supp. 15, 17 (D. C., S. D., Tex., 1953)); and it is well settled that administrative remedies must be exhausted before resort may be had to the Courts (*Meyers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938); *Samaniego v. Brownell*, 212 F. 2d 891 (C. A. 5, 1954); *Florentine v. Landon*, 206 F. 2d 870 (C. A. 9, 1953)).

It is submitted, therefore, that by reason of appellant’s failure to include in his Petition the aforementioned allegations, the District Court did not acquire jurisdiction of the subject matter under the provisions of Section 360(a) of the Immigration and Nationality Act of 1952.

III.

Independent of the Provisions of Section 360(a) of the Immigration and Nationality Act of 1952, the District Court Did Not Acquire Jurisdiction Over Either the Subject Matter or the Person of Appellee.

Appellant also alleged as a basis for jurisdiction Section 2201, 28 U. S. C. A., commonly referred to as the Federal Declaratory Judgment Act [R. 3]. This Act, however, does not provide an independent basis for federal jurisdiction but merely enlarges the range of remedies available in a federal court, where its jurisdiction is otherwise established. (*Skelly Oil Co. v. Phillips Co.*, 339 U. S. 667, 671 (1950); *Southern Pacific Co. v. McAdoo*, 82 F. 2d 121 (C. A. 9, 1936)). Appellant may not therefore rely upon this statute as a jurisdictional basis for his Petition.

In his Opening Brief, appellant, for the first time, seeks to rely upon Section 1331, 28 U. S. C. A., which provides for jurisdiction of civil actions arising under the Constitution, laws or treaties of the United States. In order that jurisdiction may be effectively invoked under this statute, however, the pleading must contain an allegation that the matter in controversy exceeds the sum or value of \$3,000, exclusive of interest and costs (*Hague v. C. I. O.*, 307 U. S. 496, 507-508 (1939); *Joy v. Hague*, *supra*). Appellant's Petition contains no such averment.

Even if it be conceded that an action for declaration of nationality will lie under the Federal Declaratory Judgment Act or under Section 1331, 28 U. S. C. A., the District Court did not acquire jurisdiction over the person of appellee for such an action. The Attorney General of the

United States, appellee, has as his official residence the District of Columbia, and may be served with process only in that district, unless otherwise provided by statute. (Rule 4(d), (5), Federal Rules of Civil Procedure, 28 U. S. C. A.; *Rodriguez v. Landon*, 212 F. 2d 508, 509 (C. A. 9, 1954); *Connor v. Miller*, 178 F. 2d 755 (C. A. 2, 1949); *Avila-Contreras v. McGranery*, 112 Fed. Supp. 264, 267 (D. C., S. D., Cal., 1953); *Bustos-Ovalle v. Landon*, 112 Fed. Supp. 874 (D. C., S. D., Cal., 1953)). Appellee did not consent to jurisdiction over his person, since his Motion for Dismissal was made “without waiving any of his objections to the jurisdiction of the Court and especially appearing for the purpose of this Motion only” [R. 5-6].

IV.

Constitutional Issues Advanced by Appellant.

A. The Record Furnishes No Basis for This Court to Consider the Constitutional Issues Advanced by Appellant.

Appellant contends in his Opening Brief that the “allegations of the Petition involve a justiciable question under Article III of the Constitution of the United States” (p. 4); that the provision in Article III of the Constitution that the “judicial power shall extend to all cases, in law and equity, arising under this Constitution,” is not limited to the Supreme Court, but vested in such inferior courts as the Congress may from time to time establish (pp. 5-6); that Article III of the Constitution must be read into and in connection with the remedy available under Section 360(a) of the Immigration and Nationality Act of 1952 (p. 7); and that the Fifth Amendment affords protection against the deprivation of citizenship without the sanction afforded by judicial proceedings (p. 10).

The foregoing issues, constitutional in nature, are not properly before this Court; since *the record does not disclose, nor does appellant contend in his Opening Brief, that he is unable to allege sufficient facts to bring himself within the purview of Section 360(a) of the Immigration and Nationality Act of 1952*. This Court, in order to decide the constitutional issues raised by appellant, would be compelled to assume that appellant cannot meet the requirements of Section 360(a).

It is well established that a Court will not decide a question of constitutional law upon an abstract, hypothetical or contingent set of facts (*United Public Workers v. Mitchell*, 330 U. S. 75, 86-91 (1947); *Federation of Labor v. McAdory*, 325 U. S. 450 (1945)); neither will a Court pass upon a constitutional issue in advance of the necessity for its decision (*United States v. Rumley*, 345 U. S. 41 (1953); *United States v. Spector*, 343 U. S. 169 (1952)).

If appellant is able to allege sufficient facts to invoke Section 360(a), it will be unnecessary to decide whether the provisions of Article III of the Constitution must be read into that statute. It will also be unnecessary to determine whether one unable to avail himself of the statute is deprived of citizenship without the sanction afforded by judicial proceedings. The dismissal by the Court below was not *res judicata* (*Smith v. McNeal*, 109 U. S. 426 (1883)); and the judgment expressly provided that it should "not operate as an adjudication upon the merits" [R. 12]. Appellant can institute another action, including the necessary averments, and the decision of grave constitutional issues upon a hypothetical set of facts will be avoided.

B. The Constitutional Issues Advanced by Appellant Are Without Merit.

Assuming that this Court deems it appropriate to pass upon the constitutional issues urged by appellant, it is submitted that appellant's position is unsound. Article III of the Constitution may not be employed to confer jurisdiction upon the District Court. Only the Supreme Court of the United States derives jurisdiction directly from the Constitution. Other federal courts have only such jurisdiction as Congress has prescribed.

Kline v. Burke Construction Co., 260 U. S. 226, 233-234 (1922);

People v. Bruce, 129 F. 2d 421, 423 (C. C. A. 9, 1942), cert. den. 317 U. S. 710.

Moreover, even if appellant is unable to allege sufficient facts to obtain a declaration of nationality under Section 360(a) of the Immigration and Nationality Act of 1952, his constitutional rights will not be violated (*Gonzalez Gomez v. Brownell*, 114 Fed. Supp. 660 (D. C. S. D. Calif., 1953); *Avina v. Brownell*, 112 Fed. Supp. 15 (D. C. S. D. Tex., 1953)). Appellant will not as a consequence be deprived of citizenship without the sanction afforded by judicial proceedings, but will merely be relegated to those remedies, such as habeas corpus, which existed prior to the Nationality Act of 1940. As Judge Byrne pointed out in *Gonzales-Gomez v. Brownell*, *supra* (p. 661):

“* * * The statute does not deprive *any* citizen of his day in court. It merely limits relief under this *particular* statute to specified situations, and those who do not fall within the provisions of the statute are left to the remedies, such as habeas corpus, which existed prior to its enactment.” (Emphasis of the Court.)

Habeas corpus proceedings are sufficient to meet the demands of due process, for even in such proceedings, appellant, if a resident of the United States, would be entitled to an independent judicial determination of his claim to citizenship. (*Ng Fung Ho v. White*, 259 U. S. 276 (1922); *Carmichael v. Delaney*, 170 F. 2d 239 (C. A. 9, 1948).)

V.

Conclusion.

Wherefore, for the reasons set forth above, it is respectfully submitted that the judgment of the District Court, dismissing appellant's Petition for Declaration of United States Nationality and Declaratory Relief, should be affirmed.

Respectfully submitted,

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